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NOTES

IN REM FORECLOSURE AS A CURE TO TAX DELINQUENCY

Inability to promptly realize the property taxes upon which their revenue depends has continuously hampered efficient financing of municipalities and other taxing units. Protracted tax delinquency has, on occasion, driven the taxing authority to loan markets to make up the resulting deficiency.[1] However, long term loan financing is hazardous [2] unless the anticipated taxes, which are the security for the loans, are promptly collected. When collection attempts fail, enforcement measures must be implemented in their stead. The tax enforcement methods presently employed in a majority of jurisdictions have proved ineffective to ameliorate the fiscal problem.

Methods of Enforcement

The tax enforcement laws of the different states vary so greatly in detail that they almost defy comparison.[3] Certain common characteristics are, nevertheless, discernible.

The objective of all taxing jurisdictions is to maximize tax collections at a minimum expense, and, in every state, taxes levied upon property, when unpaid, become a first lien thereon.[4] Having created the lien, the taxing authority is confronted with the problem of its rapid liquidation. The easiest way to collect the tax when the owner is insolvent is to sell the lien to someone who has the funds. Any future adjustments must then be made between the owner and the

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[1] The expense of that debt, however, will necessarily be included in the budget for the succeeding year, while the amount of property available for taxation will be reduced. The result is higher tax rates for the conscientious taxpayer. Savage, *How to Perfect Tax Titles,* 18 ST. JOHN'S L. REV. 1 (1943); Bird, *Extent and Distribution of Urban Tax Delinquency,* 3 LAW & CONTEMP. PROB. 337 (1936).

[2] For an indication of the abnormal amount of municipal indebtedness, and the adverse financial effects caused in part by property tax delinquency, see Comment, 43 YALE L. J. 924, 925 (1934).

[3] For a detailed comparison of these various methods, see Allen, *Collection of Delinquent Taxes by Recourse to the Taxed Property,* 3 LAW & CONTEMP. PROB. 397 (1936); Smith, *Recent Legislative Indulgences to Taxpayers,* 3 LAW & CONTEMP. PROB. 371 (1936).

[4] In some states, a tax may be made a lien upon any other property belonging to the taxpayer in the jurisdiction, even though the owner is a nonresident. Nickey v. Mississippi, 292 U. S. 393 (1934).

lien purchaser. The alternative, in some states, is to acquire title to the delinquent property by the conventional foreclosure method. But most taxing authorities prefer to leave this action to the tax lien purchaser, since the proceeding is generally a long and expensive one.

Ordinarily, the lien sale is the method employed by the various states; and its operation generally follows a standardized pattern. When taxes have been in arrears for a specified time, ranging from one to four years, the resulting tax lien is sold by the taxing unit at auction to private purchasers. The latter usually pay the minimum price, to wit, the sum of the back taxes, plus accrued interest, statutory penalties, and the costs of the sale. The purchaser becomes the inchoate title holder of the land, his interest evidenced by a tax sale certificate. Legal title remains in the owner of the property and he or any other party in interest may perfect it by redeeming within a specified period, usually from one to three years. Redemption is effected by paying to the certificate holder the amount he expended for the lien, plus interim interest and penalties. If the redemption privilege is not exercised, title vests indefeasibly [5] in the purchaser through a deed issued upon application to the taxing authority. In two-thirds of the states, this latter procedure is purely administrative; elsewhere, the lien must be perfected by conventional judicial foreclosure proceedings.

If the minimum price is not bid at the sale, the taxing authority is permitted to bid in the lien, and thereafter acquire title either by application or foreclosure.[6]

Although seemingly an expeditious and well-defined procedure, the efficacy of the lien sale proceeding has been greatly diminished by the judicial attitude toward tax enforcement statutes.[7] Courts, generally, have looked beneficently on the delinquent property owner,

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[5] The purchaser at a tax sale gets a new and complete title from the state, which is not limited to such as might have been possessed by the former owner. It is not a derivative title. Eisenhut v. Marion De Vries, 150 Misc. 804, 269 N. Y. Supp. 483, *aff'd mem.*, 243 App. Div. 539, 276 N. Y. Supp. 602 (2d Dep't 1934); *accord*, O'Donnell v. McIntyre, 118 N. Y. 156, 23 N. E. 455 (1890); Becker v. Howard, 66 N. Y. 5 (1876).

[6] Allen, *Collection of Delinquent Taxes by Recourse to the Taxed Property*, 3 LAW & CONTEMP. PROB. 397, 402 (1936).

[7] In the leading case of Auditor General v. Sparrow, 116 Mich. 574, 74 N. W. 881 (1898), the court presents the historic judicial view of tax enforcement procedure. "Under the laws of many states, including our own, it has been the practice to enforce the payment of delinquent taxes upon land by a sale of a portion or the whole of the land taxed; resulting usually in the sale of the delinquent lands for a small fraction of their value. So obnoxious was this that the courts of these states, with practical unanimity, have refused to sustain these titles unless the proceedings were in all respects regular. The tax laws were intricate, and the many steps required in the assessment, levy, return, advertisement, and sale involved official action of so many persons, and clerical work so great in detail, that it was seldom that the tax proceedings were perfect, and it was for many years the common understanding that tax deeds were uniformly void." *Id.* at 583, 74 N. W. 884.

and, conversely, have regarded with suspicion every enforcement measure designed to cut off the delinquent's equity in his property. Tax deeds are, accordingly, extremely vulnerable to attack by the former owner, and singularly unattractive to the prospective tax purchaser. To offset the sale-deterrent effect of this uniform judicial generosity to delinquent owners, legislatures have enacted various measures designed to encourage participation at tax sales. Such attempted remedial legislation has taken three major forms: evidentiary, curative and restrictive.

1. *Evidentiary*

Many states have enacted statutes making a tax deed prima facie evidence of the regularity of all proceedings leading up to its execution. Whereas the onus is ordinarily upon the tax purchaser to plead and prove strict compliance with the numerous required proceedings,[8] the burden of proving any divergence from statutory mandates is shifted by such statutes to the one attacking the deed.[9] But the courts have generally held that such statutes deal only with procedural defects in connection with the tax sale, and have refused to extend their application to jurisdictional defects.[10] Attempts by the legislature to make a tax deed conclusive evidence of a jurisdictional fact, thereby cutting off all right to attack the tax title, have been held unconstitutional.[11]

2. *Curative Statutes*

In an attempt to minimize attacks upon tax titles, some jurisdictions have enacted statutes specifically limiting the defects which will invalidate a tax deed.[12] The courts have quickly pointed out, however, that the legislature is powerless to validate a deed by any curative provisions in violation of state and federal due process requirements. In addition, they have whittled away at the efficacy of such statutes by placing in the category of jurisdictional defects some of the very deficiencies which the legislatures have attempted to limit. Thus the sale of an owner's land to satisfy the tax obligation of an-

[8] Stead's Executors v. Course, 4 Cranch 403, 413 (U. S. 1808). "It would be going too far to say that a collector selling land with or without authority, could, by his conveyance, transfer the title of the rightful proprietor. He must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted."

[9] Laney v. Proctor, 236 Ala. 318, 182 So. 37 (1938); Taff v. Hodge, 132 Fla. 642, 182 So. 230 (1938); Town of Lexington v. Ryder, 296 Mass. 566, 6 N. E. 2d 828 (1937).

[10] Roma v. Elbert, Ltd., 73 Cal. App. 2d 388, 166 P. 2d 294 (1946); Lindlots Realty Corp. v. Suffolk County, 251 App. Div. 340, 296 N. Y. Supp. 599, *motion denied*, 252 App. Div. 753, 298 N. Y. Supp. 1009 (2d Dep't 1937).

[11] Gates v. Morris, 123 W. Va. 6, 13 S. E. 2d 473 (1941).

[12] Welborn v. Whitney, 190 Okla. 630, 126 P. 2d 263 (1942).

other,[13] or failure to give the required notice of application for the tax deed,[14] have been held to be incurable by legislative fiat.

3. *Restrictive Measures—Short Statutes of Limitation*

Many states have provided for a relatively short period within which an owner may object to the validity of a tax deed.[15] Under these statutes, the objection is barred even though based upon strong jurisdictional grounds.[16] However, to prevent potential hardship, courts have held that these statutes cannot be applied to defeat the claim of an owner in peaceful possession[17] without notice of the tax proceeding. Moreover, the tax deed grantee, attempting to perfect his title, must be in possession of the premises to enable him to assert the bar of the statute against former owners.[18]

Even if the tax sale is in all respects regular, the owner is not irrevocably divested of his title. He may defeat the sale and protect his title by redeeming within the statutory period.[19] The right to redeem is usually granted to all former owners; and the term "owner" has been held to include lienholders,[20] such as mortgagees,[21] judgment creditors, and holders of contingent interests in the affected lands.[22] Under most statutes, notice of the expiration of the redemption period must be given to all interested parties.[23] These statutes have been consistently construed liberally in favor of the

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[13] Doud v. Huntington Hebrew Congregation, 178 App. Div. 748, 165 N. Y. Supp. 908 (2d Dep't 1917).

[14] Gates v. Morris, 123 W. Va. 6, 13 S. E. 2d 473 (1941).

[15] See Dunkhum v. Maceck Bldg. Corp., 256 N. Y. 275, 176 N. E. 392 (1931) (3 years); Michie v. Haas, 134 Okla. 57, 272 Pac. 883 (1928) (12 months).

[16] Bryan v. McGurck, 200 N. Y. 332, 93 N. E. 989 (1911); Meigs v. Roberts, 162 N. Y. 371, 56 N. E. 838 (1900); Doud v. Huntington Hebrew Congregation, 178 App. Div. 748, 165 N. Y. Supp. 908 (2d Dep't 1917). *But cf.* Brown v. Ellison, 239 Ala. 320, 194 So. 822 (1940); Peterson v. Martino, 210 N. Y. 412, 104 N. E. 916 (1914).

[17] Buty v. Goldfinch, 74 Wash. 532, 133 Pac. 1057 (1913); *cf.* Massey v. Bickford, 208 Ark. 685, 187 S. W. 2d 541 (1945).

[18] Leavenworth v. Claughton, 197 Miss. 606, 19 So. 2d 185, *aff'd*, 197 Miss. 606, 20 So. 2d 821 (1945) (there must be adverse possession to start the statute running); *see* Denny v. Stevens, 52 Wyo. 253, 73 P. 2d 308, 310 (1938).

[19] Baker v. State Land Office Board, 294 Mich. 587, 293 N. W. 763 (1940); *see* Kostanowski v. Donchig, 50 N. Y. S. 2d 533, *aff'd*, 269 App. Div. 194, 195, 55 N. Y. S. 2d 487, 488 (3d Dep't 1945).

[20] Downing v. City of Russellville, 241 Ala. 494, 3 So. 2d 34 (1941).

[21] Farmer v. Hill, 243 Ala. 543, 11 So. 2d 160 (1942); Bates v. Pabst, 223 Iowa 534, 273 N. W. 151 (1937).

[22] Moffitt v. Reed, 131 Neb. 696, 269 N. W. 621 (1936) (redemption by remainderman).

[23] Lamar Life Ins. Co. v. Billups, 175 Miss. 771, 169 So. 32 (1936) (failure to notify lienors renders tax sale void as to them); Kerr v. Small, 112 Mont. 490, 117 P. 2d 271 (1941) (notice to owner of 1/5 interest and not to owner of the other 4/5 interest voids resulting tax deed); Martin v. Atkinson, Warren & Henley Co., 195 Okla. 19, 154 P. 2d 945 (1945) (owners of mineral interest in land were "owners" within meaning of statute).

party redeeming.[24] Thus, the courts have continued to show a tender regard for the owner of the tax delinquent property, and have fought back legislative attempts to swing the pendulum to the side of the tax purchaser.

Tax Enforcement in New York City

The Tax Lien Sale

As a basis for comparative study, the methods of enforcing tax liens in the City of New York will be considered. The lien-sale procedure operates in the following manner: when property taxes remain unpaid for three or more years, the resulting tax lien may be advertised and sold to a person who will pay the full amount of the arrears, including interest and penalties. The lien is sold at public auction to whomever agrees to accept from the owner of the delinquent property the lowest rate of interest (not to exceed twelve per cent)[25] on the money advanced. The owner has three years from the date of the lien transfer within which to redeem the property, provided, however, that he make semi-annual payments of interest at the rate bid and pay the current taxes promptly. If he fails to do either, then at the option of the holder of the lien, the entire amount becomes due and payable thirty days after default in the interest payment, or six months after default in payment of current taxes.[26] The holder of the lien may then bring an action in the supreme court to foreclose the lien, in the same manner as an action to foreclose a mortgage.[27] Any surplus from the referee's sale is held or invested for the benefit of the persons entitled thereto.[28]

In many instances the amount of the tax lien so closely approximates the value of the property that no bids can be obtained. This is for the reason that New York statutes require judicial foreclosure of the lien,[29] and the difference between the price of the lien and the value of the land seldom absorbs the cost of the title search necessary to determine all the interested parties who must be personally served.[30] The discovery of non-resident, minor, incompetent or mul-

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[24] *In re* Bingham's Estate, 17 N. Y. S. 2d 981 (Surr. Ct. 1940); Quilling v. Waggoner, 210 Wis. 507, 246 N. W. 564 (1933).

[25] N. Y. CITY ADMIN. CODE § 415(1)-25.0.

[26] *Id.* § 415(1)-36.0.

[27] *Id.* § 415(1)-39.0.

[28] *Id.* § 415(1)-45.0.

[29] *Id.* § 415(1)-39.0.

[30] In 1938, New York City owned approximately 29,275 tax liens on property assessed at $45,000,000. Approximately $11,000,000 was the amount of delinquent taxes due thereon. Only 650 of these liens were in the process of being foreclosed by the Corporation Counsel. It was estimated that under the law it would cost $700 per parcel to foreclose all the liens, a total of $19,792,500. Fairchild, *Tax Titles in N. Y. State,* 8 BROOKLYN L. REV. 61, 72 (1938).

tiple owners complicates service of process and entails additional expense.

If there is no bid for the lien at the interest-rate sale, the City may, and usually does, become its owner at a twelve per cent interest rate. The City treasurer may then fix a lower minimum amount for which the lien may be sold. The lien, still bearing twelve per cent interest, is again advertised and sold, at what is called a cut-rate sale, to the person bidding the highest amount above the sum fixed.[31] This procedure is repeated until the lien is sold.[32] Note, however, that when the City reduces the amount of the lien, the tax arrears are never fully realized; and the purpose and effectiveness of the tax sale are destroyed.

From the standpoint of the City, and other taxing authorities using similar methods, this procedure has not proven effectual for enforcing tax payments. The procedure is time-consuming and has resulted in a backlog of valueless liens for which the costs of perfecting title by foreclosure are prohibitive.

The Remedy—In Rem Tax Foreclosure

Cognizant of the prevalence of tax delinquency, the New York State legislature has made available to the taxing units an *in rem* summary foreclosure procedure,[33] designed to effectuate a rapid foreclosure on delinquent property, while at the same time avoiding the prohibitive costs of a title search and personal service of process. The proceedings are brought by the taxing district itself, directly against the property, resulting in the vesting of the fee[34] interest in the foreclosing district. Any tax district[35] may elect to take advantage of this procedure by adopting a resolution to that effect.[36]

When the taxes on property have been in arrears for at least four years, any taxing district owning the lien thereon may institute the *in rem* foreclosure action.[37] The collecting officer annually prepares a list of *all* the affected properties.[38] Each parcel is numbered

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[31] N. Y. CITY ADMIN. CODE § 415(1)-33.0.

[32] *Ibid.*

[33] N. Y. TAX LAW Art. VII-A, Title 3, added by Laws of N. Y. 1939, c. 692, § 2.

[34] N. Y. TAX LAW § 165-h(6).

[35] *Id.* § 161(2)(a). See Boeck v. Incorporated Village of South Floral Park, 174 Misc. 372, 19 N. Y. S. 2d 946 (Sup. Ct. 1940).

[36] N. Y. TAX LAW § 162(1).

[37] N. Y. TAX LAW § 165. Although the statute reads: "Whenever it shall *appear* that . . . a tax lien . . . has been . . . unpaid for . . . at least four years . . ." (italics added) the proceeding would probably be held null and void if, in fact, the taxes were paid on a parcel being foreclosed. Risley v. Phenix Bank, 83 N. Y. 318 (1881). See Lynbrook Gardens v. Ullman, 291 N. Y. 472, 53 N. E. 2d 353 (1943), *cert. denied*, 322 U. S. 742 (1944).

[38] N. Y. TAX LAW § 165-a(1). This section also enumerates certain instances in which a parcel of delinquent property may be excluded from the list.

serially on the list which contains as to each parcel: (a) a brief description of the property, (b) the name of the last known owner of the property as it appears on the assessment rolls, and (c) the amount of the lien together with interest and penalty rates.[39]

The action commences by filing the list of delinquent taxes in the county clerk's office.[40] Certified copies of the list are also filed in the office of the attorney for the taxing district, and in the office of the collecting officer of any other taxing district having a co-extensive right to assess any of the parcels involved therein. The filing of the list in the county clerk's office has the effect of filing an individual *lis pendens* therein, and of an individual summons and complaint against the property in the county court, or, in New York City, the supreme court.[41] The mere filing, however, does not cut off the owner's rights in the property: he is given another, but now final, chance. Concurrently with the filing of the list in the county clerk's office, a public notice of foreclosure, but not including a list of the properties affected, is published once a week for six consecutive weeks in two newspapers. In addition, copies thereof are posted in three public places within the tax district.[42] Notice to all the world is thereby given that the list of delinquent taxes has been filed, and that all persons having or claiming an interest may examine the list at the county clerk's office. Moreover, the collecting officer is required to mail a copy of such notice to each property owner on the list, with an additional statement informing him of the proceeding. But failure to comply with this latter provision has no effect on the validity of the proceeding.[43] A mortgagee, lienor or other interested party may attempt to protect himself from loss of his security through the owner's default by filing a notice with the collecting officer requesting that he be mailed any notice required under the statute. But likewise, in this instance, failure of the collecting officer to comply does not invalidate the proceeding.[44]

Included in the statutory notice is the final date for redemption by any interested party. At least seven weeks from the first date of publication must be allowed.[45] The courts have construed the redemption provision strictly in favor of the owner, holding that a

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All other parcels must be included in the list, but the inadvertent failure of the collecting officer to list all of the parcels will not invalidate the proceeding. *But cf.* Butler v. Cassone, 125 N. Y. L. J. 791, col. 5 (Sup. Ct. Mar. 5, 1951).

[39] N. Y. TAX LAW § 165-a(1).

[40] *Ibid.*

[41] *Ibid.*

[42] *Id.* § 165-b.

[43] *Ibid.*

[44] *Id.* §§ 165-c, 166-e. Section 166-c directs the collecting officer to mail tax bills to the owner, but failure to do so does not affect the validity of the proceeding or the title of a purchaser thereunder.

[45] N. Y. TAX LAW § 165-b.

failure to provide the full forty-nine days invalidates the proceeding [46] by depriving the court of its jurisdiction to render a judgment.[47] These decisions, exposing, in certain instances, the title acquired by the tax district or its grantee, to future attack, prompted an amendment to the statute making a deed conclusive evidence of the regularity of all proceedings two years after it is recorded.[48]

Any party in interest may, by statute, serve an answer on the attorney for the tax district within twenty days after the last day for redemption, setting forth objections or defenses to the foreclosure of the lien.[49] The burden is upon the defendant to plead and prove jurisdictional defects or other invalidity, for the tax lien and all the steps leading up to its issuance are favored with a presumption of validity.[50] If the defendant establishes his interest in the affected parcel, the court has the power to determine the equities of the parties,[51] and, in its discretion, direct the sale of that parcel [52] at public auction according to statutory directives.[53] Where the only party answering is another taxing district, an arrangement may be made between the two districts for a conveyance to one, free and clear of the other's interest or subject to its interest, without the necessity of a sale.[54]

Where the property is not redeemed, no answer is interposed, or the defendant's contentions are not upheld,[55] the final judgment directs the collecting officer to prepare, execute and record the deed

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[46] City of New Rochelle v. Stevens, 271 App. Div. 977, 68 N. Y. S. 2d 31 (2d Dep't), *aff'd mem.*, 297 N. Y. 533, 74 N. E. 2d 533 (1947).

[47] Hogg v. Allen, 196 Misc. 265, 93 N. Y. S. 2d 866 (Sup. Ct. 1949); City of White Plains v. Hadermann, 272 App. Div. 507, 72 N. Y. S. 2d 155 (2d Dep't 1947), *aff'd mem.*, 297 N. Y. 623, 75 N. E. 2d 634 (1947) (A news item in a local newspaper to the effect that the city had extended the time for redemption was without legal effect to cure the failure to comply with the statute.).

[48] N. Y. TAX LAW § 165-h(7). See Huntington v. Kohlasch, 96 N. Y. S. 2d 22 (Sup. Ct. 1950).

[49] N. Y. TAX LAW §§ 165-a(1), 165-e. Where a party answered in the prescribed time, but failed to set up a procedural defect in the proceeding as a defense at that time, the resulting judgment of foreclosure was *res judicata*, and the defect could not be revived at a subsequent time. Echo Bay Waterfront Corp. v. City of New Rochelle, 275 App. Div. 672, 86 N. Y. S. 2d 500, *reargument and appeal denied*, 275 App. Div. 718, 88 N. Y. S. 2d 256 (2d Dep't 1949).

[50] N. Y. TAX LAW § 165-g. See City of New Rochelle v. Stevens, 27 App. Div. 977, 68 N. Y. S. 2d 31 (2d Dep't), *aff'd mem.*, 297 N. Y. 533, 74 N. E. 2d 469 (1947).

[51] N. Y. TAX LAW § 165-h(1).

[52] *Id.* § 165-h(2).

[53] *Id.* § 165-h(4).

[54] *Id.* §§ 165-h(3), 166-a. See also § 166-b. For the general rules governing conflicting liens of the various taxing units, see Notes, 134 A. L. R. 1286-1290 (1941); 135 A. L. R. 1466 (1941).

[55] *In re* Village of Mamaroneck, 273 App. Div. 777, 74 N. Y. S. 2d 836 (2d Dep't 1947).

conveying title [56] to the tax district in fee simple absolute.[57] Thereafter, all persons,[58] including infants, incompetents, absentees and nonresidents, are forever barred from any right, title, interest, claim, lien or equity of redemption in the property.[59] The taxing district may then sell the property either with or without advertising for bids.[60]

The *in rem* procedure lends judicial authenticity to tax foreclosure. The final order directing a conveyance contains findings of fact based upon proof of compliance with statutory directives,[61] thereby removing the basis of court criticism directed at those procedures which were purely administrative.

Constitutionality

The *in rem* foreclosure procedure is radical when compared with the due process requirements of other actions. Attacks have been directed at the insufficiency of notice, the failure of the statute to safeguard vested property rights of infants and incompetents who under the law are incapable of protecting themselves, and the failure to require a sale and distribution of any surplus money to the owners of the property.[62] Nevertheless, the constitutionality of *in rem* notice by means of publication has long been upheld,[63] and courts of the jurisdictions which have enacted *in rem* foreclosure statutes have uniformly held them to be constitutional.[64] Their constitutionality is upheld in the public interest on the premise that a property owner is generally chargeable with knowledge that his property is subject to taxes, and proceedings ". . . which might fail to constitute 'due process of law' under circumstances where no liability was antici-

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[56] See note 10 *supra.*

[57] N. Y. TAX LAW § 165-h(6).

[58] *Id.* § 168-d. Added by Laws of N. Y. 1951, c. 347, § 3. "Notwithstanding any other provision of this article . . . lands of the state shall not be sold in any action for the foreclosure of a tax lien . . . nor shall any judgment in any such action . . . be valid or effectual to bar or foreclose the state with respect to . . . any lands involved in such action."

[59] N. Y. TAX LAW § 165-h(5). But the conveyance does not extinguish an easement created prior to the date when the assessment represented by the lien became a lien. Tax Lien Co. v. Schultze, 213 N. Y. 9, 106 N. E. 751 (1914); OP. ATTY. GEN. 296 (1945).

[60] N. Y. TAX LAW § 166-i. But see Wekando, Inc. v. City of Yonkers, 195 Misc. 102, 91 N. Y. S. 2d 193 (Sup. Ct. 1949).

[61] N. Y. TAX LAW § 165-h(1).

[62] See Lynbrook Gardens v. Ullman, 291 N. Y. 472, 53 N. E. 2d 353 (1943), *cert. denied,* 322 U. S. 742 (1944).

[63] Tyler v. Judges of the Court of Registration, 179 U. S. 405 (1900).

[64] Ontario Land Co. v. Wilfong, 223 U. S. 543 (1912); Leigh v. Green, 193 U. S. 79 (1904); Winona & St. Peter Land Co. v. Minnesota, 159 U. S. 526 (1895); Spitcaufsky v. Hatten, 353 Mo. 94, 182 S. W. 2d 86 (1944). See Note, *Constitutional Law—In Rem Notice by Publication—Wisconsin's 1947 Tax Lien Foreclosure Statute—Section 25.521,* WIS. L. REV. 367 (1949).

pated, might well be effective and binding in the case of a known and recognized liability." [65] Moreover, the owner is not deprived of his constitutional right to a trial by jury. Such right exists today only if it did at common law, and, at common law, there was no right to a jury trial in tax proceedings.[66]

Some Results of the In Rem Procedure in New York City

Although New York City has not adopted Article 7-A, title three of the New York Tax Law, it has secured the benefits of the *in rem* procedure through a parallel enactment [67] which makes provision for the special conditions existing in the metropolitan area. These conditions are: (1) the size of the City, which makes it practically impossible to file annually a single list of all tax delinquent property; and (2) the great amount of property which will be affected by the *in rem* procedure.[68] Accordingly, the 134 tax sections of the City, for the purposes of tax foreclosure, are considered individual tax districts. In addition, parcels, which would ordinarily appear on the list, may be excluded by the Board of Estimate for certain specific reasons,[69] thereby decreasing the number of parcels affected. In all other respects the New York City *in rem* procedure is substantially the same as that contained in the Tax Law.

As of January 1, 1952, nineteen tax sections had completed foreclosure actions resulting in the City's acquisition of 6,896 parcels. It has been the experience of the City that approximately one-third of the delinquent property owners pay the overdue taxes when their property is subjected to an *in rem* action.[70] In addition to the property obtained, the City has also acquired approximately 1,962 tenants

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[65] City of Utica v. Proite, 178 Misc. 925, 929, 36 N. Y. S. 2d 79, 82 (Sup. Ct. 1941), *aff'd mem.*, 288 N. Y. 477, 41 N. E. 2d 174 (1942); *accord*, City of New Rochelle v. Echo Bay Waterfront Corp., 268 App. Div. 182, 49 N. Y. S. 2d 673 (2d Dep't 1945), *aff'd mem.*, 294 N. Y. 678, 60 N. E. 2d 838 (1945), *cert. denied*, 326 U. S. 720 (1945). See Note, 160 A. L. R. 1026 (1946).

[66] City of New Rochelle v. Echo Bay Waterfront Corp., *supra* note 65.

[67] N. Y. CITY ADMIN. CODE §§ D17-1.0 to D17-24.0.

[68] It has been estimated that approximately 85,000 parcels will be affected by the *in rem* procedure. ANNUAL REPORT FOR THE YEAR 1951, BUREAU OF REAL ESTATE, BOARD OF ESTIMATE.

[69] These reasons are: (1) a meritorious question has been raised by an interested party as to the validity of the tax lien; (2) before July 1, 1948, the treasurer agreed to accept payment of 2 years' arrears with each current year's tax, and there has been no default in such agreement; (3) the owner agreed to pay the arrears in stated installments, and there has been no default; and (4) within the last two years a tax lien owned by the city was sold to a person who has not completed the necessary foreclosure proceeding. N. Y. CITY ADMIN. CODE § D17-5.0.

[70] The original number of parcels on the list was 9,294. The amount collected from those owners who redeemed was $1,777,871. ANNUAL REPORT FOR THE YEAR 1951, BUREAU OF REAL ESTATE, BOARD OF ESTIMATE.

occupying these premises, paying a total gross yearly rental of $642,104.

One of the problems raised by the *in rem* procedure is the product of an unusual situation by which the City has acquired fifteen properties used for charitable and religious purposes. They include churches, synagogues, colleges and parochial schools.[71] Although these properties are ordinarily tax exempt, they were caught in the *in rem* net by reason of unpaid taxes levied prior to the time when they had acquired their tax-exempt status. However, the State legislature recently enacted a provision [72] which would allow return of the property to these organizations upon payment of the arrears.

Advantages of the In Rem Method

Any efficient method of enforcing the payment of taxes is equally advantageous to the City and its citizens, for it insures the solvency of the former and removes the burden on the diligent taxpayer of paying the delinquent's share. The short and precise *in rem* procedure has effected a rude awakening of those property owners who were lulled into an attitude of laxity in tax payment by the time consuming and expensive lien-sale procedure. Moreover, the City may now foreclose the enormous backlog of tax liens for which bids have been unobtainable, and acquire title to the affected parcels at a cost which is negligible when compared to that of conventional foreclosure methods.[73] Eventually, the practice of selling cut-rate liens will be eliminated.

The decisions, upholding the validity of the *in rem* statute and the marketability of the titles derived thereunder, have encouraged lending institutions, title attorneys and title insurers to accept such

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[71] ANNUAL REPORT FOR THE YEAR 1951, *supra* note 70.

[72] N. Y. CITY ADMIN. CODE § D41-43.0, added by Laws of N. Y. 1952, c. 567.

[73] The Tax Policy League, in its symposium, *Property Taxes,* has compiled a "comparative cost per parcel" table under the New York *in rem* statute, clearly illustrating the savings to the collecting unit in a typical foreclosure action.

TABLE OF COSTS

	Mtge. Foreclosure Plan	*In Rem Plan*
Title search	$12.50	$00.00
Notice to redeem	5.00	.25
Tax search	1.00	1.00
Continuation tax search	1.00	0.00
Continuation title search	3.50	0.00
Serving summons & complaint	5.00	.25
Advertising fee	28.00	.10
Legal fees	45.00	3.00
	$101.00	$4.60

titles without question.[74] It is therefore reasonable to assume that a price for each parcel commensurate with its actual market value will be readily obtained by the foreclosing district. By consolidating odd-shaped lots where possible, and making the resale price of all the acquired property somewhat attractive to prospective purchasers, the City will not only maximize the collection of tax arrears, but will succeed in returning the properties to the tax rolls so that they may again become revenue producing.

Some Adverse Effects of the In Rem Procedure

In isolated instances, extreme hardship may result from the operation of the *in rem* procedure. Thus, the City may acquire title to property valued at many times the amount of its tax lien. Whereas, in the usual foreclosure, the delinquent property is sold at public auction, such procedure is entirely eliminated under the *in rem* statute. The result is that the owner of a parcel of land valued at seven thousand dollars will lose his entire equity in the property when a tax lien thereon of one thousand dollars is foreclosed *in rem*. Then, too, in the case of mortgaged property, while it is true that the owner remains liable on the bond, the mortgagee loses the security for his loan and is relegated to the dubious remedy of a personal action against the owner.

In a few instances where the owner had attempted to redeem his property after the specified redemption period had lapsed, but before final judgment and before the rights of third parties had intervened, he was flatly refused such remedy.[75] It is submitted that in such cases the City has lost sight of the true purpose of the statute, to wit, the enforcement of tax payments.

None of the usual safeguards for the protection of minors or incompetent persons have been incorporated in the *in rem* statute. Whereas, in usual proceedings, infants and incompetents are traditionally regarded as wards of the court and entry of judgment against them is not permitted until a guardian *ad litem* has been appointed to protect their interests, it is possible, under the *in rem* proceeding, for an infant or incompetent owner to be deprived of his property without any comprehension on his part of the nature of the action.

The provisions of the statute for notice bear no relation to reality. Mailing the notice of foreclosure to the owner is effected by utilization of the registered owner list, which is not an official record and in many instances does not contain the name of the true owner.

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[74] It has been the experience of the City that in the resale of property acquired by *in rem* foreclosure, in all cases, the grantee has succeeded in having his title insured.

[75] Matter of City of New York, 125 N. Y. L. J. 1092, col. 6 (Sup. Ct. Mar. 27, 1951); City of Peekskill v. Perry, 272 App. Div. 940, 72 N. Y. S. 2d 351 (2d Dep't 1947).

Notice on the basis of this list is often an empty gesture. The filing of a *lis pendens* has always been considered *theoretical* notice and, in a large city, it can hardly be said to convey actual notice. Posting a notice of foreclosure in the county courthouse and in three other places in the borough where the affected properties are situated, is an equally vain gesture. Finally, the statute requires the notice to be published in three newspapers, *viz.*, the City Record, which few people see, the New York Law Journal, which only lawyers read, and in any other newspaper, which may be one of dozens.[76]

Conclusion

The enactment of the *in rem* foreclosure statute marks the culmination of legislative attempts to devise an efficient, rapid, and inexpensive tax enforcement method and to deter tax delinquency. The latter is an evil which wreaks havoc upon the financial structures of political units which depend upon real estate taxes as their chief source of revenue. The operation of this procedure has already demonstrated its effectiveness toward achieving those ends. It is submitted, however, that since the *in rem* proceeding is so radical in nature and so drastic in its effects, more stringent safeguards for the protection of the property owner should be embodied in its provisions. A genuine attempt should be made to inform the delinquent owner of the impending foreclosure in a manner based upon reality of notice. In addition, provision should be made for a holding by the taxing authority, for the benefit of the parties entitled thereto, of any extraordinary surplus resulting from the sale of the property foreclosed.

Civil Arrest in Equity Actions

Introduction

An order of arrest is a provisional remedy which permits the incarceration of a defendant as an incident to the prosecution of a civil action. In equity actions, it is designed to insure a defendant's presence in court where that is essential for the performance of some act which the court may direct.[1] An irate student once wrote that

[76] For a recent article strongly criticizing the *in rem* procedure in New York City, see Stein, *"In Rem"—That Remarkable Remedy,* Bronx Real Estate & Building News (Oct. 1951).

[1] N. Y. Civ. Prac. Act § 827.